

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

JUN - 2 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-75
)	
TRINITY BROADCASTING OF FLORIDA, INC.)	File No. BRCT-
)	911001LY
For Renewal Of License of Station)	
WHFT(TV), Miami, Florida)	
)	
and)	
)	
GLENDAL E BROADCASTING COMPANY)	File NO. BPCT-
)	911227KE
For Construction Permit)	
Miami, Florida)	

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Petitioners League of United Latin American Citizens, (hereinafter "LULAC"), and the Spanish American League Against Discrimination ("SALAD") respectfully submit this reply to the Opposition to Petition for Reconsideration filed by Trinity Broadcasting of Florida ("TBF Opp.") on May 20, 1993, and the Mass Media Bureau's Motion to Dismiss

entertained except in one very limited circumstance. MMB Mot. at 2; TBF Opp. at 5.

These contentions are without merit.

A. Petitioner LULAC Has Shown Good Cause Why It Did Not Participate Below.

LULAC made a good cause showing as to why it was unable to participate below. LULAC's and SALAD's Petition for Reconsideration n.2 ("LULAC Pet."). LULAC argued that its members suffered no injury until the Hearing Designation Order, FCC 93-148 ("HDO"), was issued and that it could not have foreseen that the HDO would modify the Commission's traditional application of the Grayson policy. TBF, however, refutes LULAC's claim by first stating that "nobody is injured by a Commission action until the Commission takes action." TBF Opp. at 4. (emphasis in original). Second, TBF states that "a claim of surprise at the outcome of a Commission decision 'is no basis for a new party to file a petition for reconsideration.'" TBF Opp. at 4, quoting Press Broadcasting Company, 3 FCC Rcd 6640 (1988). These claims should be rejected.

First, the Commission's rules specifically contemplate that a non-party's interest in a proceeding may not arise until after the Commission has taken action, or that a non-party may not have had proper notice that a Commission action would adversely affect its interests. Accordingly, the rules provide that a party may file a petition for reconsideration if it has not participated below upon a showing of good cause. Here, LULAC had no reason to intervene in the license renewal of one Miami station. Not until the Commission issued its Designation Order stating that Trinity Broadcasting Network and its affiliates ("Trinity") and National Minority Television ("NMTV") would be permitted to dispose of their licenses was LULAC on notice that the interests of its members would be adversely affected.

Second, the cases TBF cites to support its position that the unforeseeability of a

Commission action is not "good cause" for failure to participate below are inapposite. In those cases, the party seeking to file a petition for reconsideration had notice and an ability to participate in the proceedings below. Press Broadcasting Company, 3 FCC Rcd 324 (1988) (The "non-party" seeking reconsideration had sufficient notice because it lived in the relevant community and sought reconsideration based upon information that was before the Commission during the initial proceeding.); KRPL, Inc., 5 FCC Rcd 2823 (1990) (The "non-party" was on notice and the injury to the "non-party" would have been the same without the change in Commission rules.) Here, LULAC's members in communities outside the Miami listening area had neither notice nor a reason to participate in the proceeding below; they were not injured until the Commission issued the HDO. Thus, it is unlikely that LULAC could have demonstrated the requisite "interest" for standing purposes at an earlier stage in the proceeding.¹

B. The Hearing Designation Order is a "Final" Commission Action Subject to a Petition for Reconsideration.

The MMB does not question the finality of the Commission's action. TBF, however, claims that the Commission action "will not be 'final' unless and until it is reaffirmed when the Commission passes on any such renewal or transfer application that may be filed." TBF Opp. at 6. TBF argues that "the Commission can reconsider [whether Trinity should be permitted to renew or transfer their licenses] just as well then as now," TBF Opp. at 6-7, because "[a]ssuming they can establish standing, Petitioners will have the opportunity at the appropriate time to oppose any future renewal or transfer application and persuade the

¹ Co-Petitioner SALAD, of course, did participate in the earlier stages. Therefore, even if the Commission finds that LULAC has failed to show good cause, that finding would not prevent the Commission from considering the merits of the petition.

Commission . . . that such application(s) should not be granted."² TBF Opp. at n.4.

TBF's assumption that LULAC and SALAD could challenge future renewal or transfer applications, however, is incorrect, and indeed, is the very reason why LULAC and SALAD are seeking reconsideration now. The Commission's Grayson policy was adopted to create more certainty for licensees by requiring the FCC to determine at the time the issues are designated for hearing whether to permit a multiple licensee to freely transfer their "uninvolved" licenses. Grayson Enterprises, Inc., 79 FCC 2d 936, 940-941, modified, Transferability of Licenses, 53 RR 2d 126. Such certainty can be achieved only if the Commission's decision constitutes a final determination that the pendency of unresolved character issues will not be considered in determining whether to approve the renewal or transfer of any of the "uninvolved" licenses. Id.; See also RKO General, Inc., 1 FCC Rcd 1081, 1084 (1986), recon. granted in part and denied in part, 2 FCC Rcd 113 (1987). In addition, the Commission's adoption of the Grayson policy was intended to ameliorate the kind of inefficiency that would ensue if a multiple licensee owner were challenged on the same issues in twelve different communities. Grayson, 79 FCC 2d at 939. If TBF were correct that the Commission will permit the issues raised in the Miami proceeding to be raised in subsequent renewal or transfer proceedings, this is by no means clear from published Commission policies. Petitioners do not read Grayson as so holding. At the very least, then, the Commission should expressly and unambiguously specify that this was its

² As a threshold matter, TBF's contentions demonstrate a fundamental misunderstanding of "finality." A Commission action may be final as to one party and not final as to another. The Commission's hearing designation order is not "final" as to TBF because it is a major participant in the hearing itself. On the other hand, the Commission's decision to permit Trinity to dispose of its "uninvolved" licenses, thereby precluding Petitioners from raising those issues in subsequent renewal or transfer proceedings, is "final" as to Petitioners.

intention.³

C. LULAC and SALAD Have Demonstrated Why the Commission Should Make an Exception to its General Policy of Not Entertaining Petitions for Reconsideration of Hearing Designation Orders.

While Petitioners agree with the MMB that it is not the Commission's standard practice to consider petitions for reconsideration of hearing designation orders, MMB Mot. at 3, Petitioners have nonetheless shown that the far-ranging implications of the issues raised in the petition warrant its consideration by the Commission. Petitioners have cited a number of cases in which the Commission has considered petitions for reconsideration of hearing designation orders. See LULAC Pet. at n.9. TBF argues that petitioners have mistakenly relied on the few cases in which the Commission has reconsidered designation orders. TBF Opp. at 7. The important point, however, is not how many times the Commission has considered such petitions, but rather the fact that the Commission has considered such petitions where warranted. Here, the Commission's reconsideration of LULAC's petition is warranted, because there is no way to obtain review of a final Commission action.

There is thus no procedural bar to the Commission's consideration of LULAC's and SALAD's petition on the merits.

II. The Commission's Statement in its Hearing Designation Order that Trinity Will Be Permitted to Dispose of its "Uninvolved" Stations Pending the TBF Proceeding Departs from Prior Commission policy.

³ An additional ambiguity is created by the Commission's indefinite statement that "[i]f issues (a) and (b) . . . are resolved against NMTV, TBN or its affiliates, the Commission will determine what actions are appropriate in connection with the stations licensed to these entities." HDO, ¶ 45. Petitioners understand that to mean that the Commission may take action against Trinity's affiliates if it decides the issues designated for hearing against Trinity. This delay is unacceptable to Petitioners. Resolution of the issues designated for hearing could take many years. In the meantime, Trinity could sell all the stations it currently owns at full price -- leaving no stations against which the Commission could "take appropriate action" if the issues are resolved against Trinity.

Petitioners showed that permitting Trinity to freely transfer its other stations in the absence of an affirmative determination that the issues raised in the Miami proceeding will not affect the licenses of the TBN affiliates arbitrarily departed from the Jefferson Radio and Grayson policies and is wholly inconsistent with § 309 of the Communications Act. LULAC Pet. at 9-14. TBF counters that the Commission

need not affirmatively find that the allegations would not bear on the operation of the other stations. The other licenses will remain unrestricted unless the Commission finds that the allegations would bear on the operation of the other stations. In other words, the other licenses will be restricted "only if there is a substantial likelihood that the allegations warranting designation of one station for hearing bear upon the operation of the other stations.'

TBF Opp. at 10 (emphasis in original).

TBF's interpretation of the Grayson policy is erroneous because it would permit the Commission to grant renewal or transfer applications without ever making the affirmative public interest finding required by the Communications Act. Section 309 (d)(2) provides that "[i]f a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with [the public interest]," it shall designate the application for hearing.

This case illustrates the problem. Assume that while the Miami hearing is pending, Trinity files an application to transfer another station. In theory, the Commission could consider the outstanding issue of whether Trinity is qualified to remain a licensee when it acts on the transfer application. However, the Commission's conclusion in the HDO that Trinity is free to dispose of licensees during the pendency of this proceeding would seem to preclude that possibility. See supra at I(B).

Yet, in the Miami HDO, the Commission found that two of the issues "could have implications for all stations licensed to NMTV, TBN and its affiliates." HDO, ¶ 45. In so

doing, the Commission in effect concedes that it is "unable to find," that the transfer of any license by a TBN affiliate would be in the public interest.⁴

If the Commission both fails to make an affirmative finding that the public interest would be served by the transfer at the time it originally designates the issue for hearing in the HDO and when an application for transfer is filed, it violates the statutory scheme because the effect is to grant an application without ever making an affirmative finding that the grant serves the public interest.

Jefferson Radio established the policy that transfer of a broadcast authorization will not be considered until the Commission has determined that the assignor is qualified to be a licensee. Jefferson Co., Inc. v. FCC, 340 F.2d 781, 783 (D.C. Cir. 1964). In Grayson, the Commission extended Jefferson Radio, concluding that if the license of a multiple owner is designated for hearing, the Commission should determine at the time of the hearing designation order whether the licensee should be permitted to freely transfer its other stations. Grayson, 79 FCC 2d at 940. Thus, in adopting the Grayson policy, the Commission neither rejected the underlying principle of Jefferson Radio,⁵ nor did the Commission attempt to bypass the requirement that it make an affirmative determination that the grant of a renewal or transfer is in the public interest. Rather, the Commission

⁴ The case which TBF cites for the proposition that the Commission need not make an affirmative determination of transferability, Strauss Communications, Inc., 2 FCC Rcd 7469 (1987), is distinguishable. There, the Commission never concluded, as it does in the instant case, that the issues designated for hearing "could have implications" on the other stations.

⁵ TBF erroneously suggests that the Commission's Grayson policy somehow waters down the Jefferson Radio policy. TBF Opp. at 11. Jefferson Radio is a longstanding Commission

concluded that it was appropriate to make this determination at the time a license is designated for hearing, even though it would not have before it a transfer or renewal application.⁶

The Commission's Jefferson Radio and Grayson policy must be applied consistently with section 309(d)(2)'s requirement that the Commission affirmatively determine that grant of an application serves the public interest. If a substantial and material question of fact remains unresolved, the Commission cannot make that finding. The Commission may not claim, as TBF suggests, that "[i]n discerning no reason to restrict the other TBN and NMTV license, the HDO in effect finds that free transferability of those licenses is in the public interest." (emphasis in original) TBF Opp. at n.8.⁷ Instead, the Commission must make an

⁶ Similarly, in its 1983 modification of its Grayson policy, the Commission decided that if the license of a multiple owner is designated for hearing, the Commission "should definitely determine the status of commonly-owned stations at time of designation." James S. River, 48 Fed.Reg. 8585 (1983). That is, the Commission would no longer permit the other stations to be renewed with a condition prohibiting their transfer pending the outcome of the hearing. This modification underscores the Commission's duty to make an affirmative determination that the free transferability of a licensee's other stations is in the public interest.

⁷ TBF erroneously contends that "[s]imply by invoking Grayson, the Commission amply identified the various intrinsic public interest consideration that warrant the 'other license' determination made here." TBF Opp. at 13. The Commission may not make a determination of whether an authorization to hold or transfer a license is in the public interest based on "intrinsic" considerations.

TBF also takes issue with Petitioners' contention that the public interest here requires that the Commission set all of Trinity's and NMTV's licenses for renewal hearings. First, and most importantly, the alleged violation here goes to Trinity's fitness to hold any broadcast license. Misrepresentation and character lapses underlying these violations if true, indubitably make Trinity unqualified to hold any Commission licenses. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1223-24 (1986), amended, 5 FCC Rcd 3252 (1990), modified, 6 FCC Rcd 3448 (1991). Furthermore, TBF wrongly asserts that "the alleged multiple ownership rule violation here does not implicate all the other licenses." TBF Opp. at 14. TBF claims that at most it implicates two licenses because Trinity "never allegedly owned/controlled more than 14 station, two over what its limit would have been if the minority exception had not applied." Id. While Trinity may never have been more than two over the ownership limit, Petitioners contend that by

affirmative finding that the transfer serves the public interest, a finding it cannot make when unresolved issues remain as to Trinity's basic qualifications that may affect all of its licenses.

Whether an issue going to a licensee's basic qualifications might "possibly affect" its other licenses or there is a "substantial likelihood" that it will, is irrelevant. In either case, the Commission is unable to determine whether the grant will serve the public interest as long as that issue remains unresolved. Thus, TBF's attempt to distinguish between the "possibly affect" and "substantial likelihood" test is merely an attempt to evade the statute by playing with words. In fact, there is no difference between these two standards. For instance, in Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 397 (D.C.Cir. 1985), the Court held that in determining whether there is a "substantial question of fact" under § 309(d), the Commission must not apply a burden of "clear, precise and indubitable" evidence. Rather, the Court reasoned that the determination of whether there is a "substantial question of fact" is "whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." Citizens for Jazz, 775 F.2d at 395, citing Columbus Broadcasting Coalition, 505 F.2d 320, 330 (D.C. Cir.); Broadcasting Enterprises, Inc. v. FCC, 390 F.2d 483, 485 (D.C.Cir. 1968). Thus, a determination of whether an issue is "substantial" is equivalent to whether an issue will "possibly" affect an outcome. The Commission's conclusion in the HDO that "the outcome of this proceeding could have implications for all stations . . ." is therefore tantamount to either a finding that the charges designated for hearing in this proceeding could "possibly affect" the transferability of all Trinity stations or that there is a "substantial likelihood" that the charges

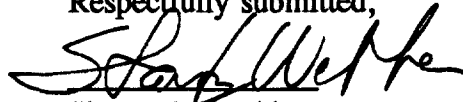
definition a violation of ownership limits pertains to all of a licensee's stations because a determination cannot be made as to which individual license violated the ownership rules at any given time. Booth American Co., 78 FCC 2d 388 (1980).

warranting designation will bear on the operation of Trinity's other stations.⁸

CONCLUSION

For the foregoing reason, Petitioners request that the Commission reconsider its designation order and set all of Trinity's and NMTV's licenses for renewal hearings consistent with its Jefferson Radio and Grayson policies.

Respectfully submitted,



Sharon L. Webber
Angela J. Campbell
CITIZENS COMMUNICATIONS CENTER
Institute for Public Representation
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9535

David E. Honig
1800 N.W. 187th Street
Miami, Florida 33056
(305) 628-3600

Andrew Jay Schwartzman
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300

Counsel for:

Spanish American League
Against

Edward Pena
8601 Georgia Avenue
Silver Spring, MD 20910

Counsel for:

League of United Latin
American Citizens

June 2, 1993

⁸ TBF also argues that the "possibly affect" standard appears in only one Commission decision, TBF Opp. at n.7. It fails to note, however, that the one place it appears is in a policy statement. Traditionally, the very purpose of a policy statement is to clearly establish Commission policy, and thus has more weight than individual cases. Moreover, TBF's indication that "Petitioners fail to note that in the ensuing paragraph the Commission framed the test as whether the allegations involve conduct 'likely' to impact the other stations," Id., serves only to demonstrate the variations in the Commission's characterization of the same standard.

CERTIFICATE OF SERVICE

I, Dianne Alston, this 2nd day of June, 1993, hereby certify that I have placed in U.S. First Class Mail, postage prepaid, a copy of the foregoing "Petition for Reconsideration" addressed to the following:

Hon. Joseph Chackin
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., #226
Washington, D.C. 20554

James Shook, Esq.
Gary Schonman, Esq.
Hearing Branch
Federal Communications Commission
2025 M Street, N.W. #7212
Washington, D.C. 20554

Colby M. May, Esq.
Joseph E. Dunne III, Esq.